X 00-2473

STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 00-2473

KAREN R. BAMMERT,

Plaintiff-Appellant-Petitioner,

vs.

DON'S SUPER VALU, INC.,

Defendant-Respondent.

ON APPEAL FROM A JUNE 12, 2001 DECISION
OF THE COURT OF APPEALS, DISTRICT III
AFFIRMING A JUDGMENT OF THE CIRCUIT COURT
FOR DUNN COUNTY, THE HONORABLE ERIC J. WAHL PRESIDING

PLAINTIFF-APPELLANT-PETITIONER'S BRIEF AND APPENDIX

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STATEMENT OF ISSUE

Is it a violation of public policy, sufficient to override the doctrine of at-will employment, for an employer to terminate an employee because of her spouse's participation in the arrest of the employer's spouse?

Trial court's answer: No.

Court of Appeals answer: No.

STATEMENT OF FACTS AND OF THE CASE

Karen Bammert was an employee of the defendant, a grocery store in Menomonie, Wisconsin, for approximately 26 years.[1] Mrs. Bammert is the wife of a Menomonie police officer. The defendant is owned by Donald Williams. Donald William's wife is Nona Williams.

On June 7, 1997, Nona Williams was pulled over for a traffic violation in Menomonie. Officers at the scene suspected that she was operating a motor vehicle under the influence of alcohol and conducted a breathalyzer test. Officer Bammert administered this test. Nona Williams failed this test as well as several field sobriety tests and was arrested, booked, and cited for driving under the influence. Mrs. Bammert's employment with the defendant was terminated, because of Officer Bammert's role in the arrest of Nona Williams.

Mrs. Bammert first filed a Fair Employment/Discrimination Complaint with the Equal Rights Division (ERD) of the State of Wisconsin on October 3, 1997. Mrs. Bammert alleged that she was discriminated against on the basis of "marital status" which is

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[1]The facts are taken from the Complaint of Mrs. Bammert (R.2), the defendant's Answer and motion to dismiss (R.4), the Equal Rights Division (ERD) filings of Mrs. Bammert (R.17:ex. D), the ERD's preliminary determination in response to these filings (R.17:ex. E), and the Wisconsin Court of Appeals' opinion in the ERD action (R.17:ex.J). The specific facts regarding the arrest of Nona Williams are set forth in the court documents appended to the brief. (R.19) Because the circuit court and court of appeals ruled that the facts as alleged did not state a claim, for the purposes of this appeal the facts as alleged by Mrs. Bammert are assumed by the court.

prohibited by Wis. Stat. §§ 111.31 - 111.395.

The ERD dismissed Mrs. Bammert's complaint, holding that it did not have the authority to take any action on Mrs. Bammert's behalf. An administrative action through the ERD can only be based upon an allegation of a legally recognized form of discrimination. Wis. Stat. § 111.39(1). "Marital status" discrimination was held to only include discrimination against a person because of that person's marital status and not to encompass discrimination based on the identity or characteristics of their spouse. Mrs. Bammert appealed and, ultimately, the Wisconsin Court of Appeals affirmed the dismissal of Mrs. Bammert's complaint by the ERD, holding that marital status discrimination does not include discrimination based on spousal identity. Bammert v. LIRC, 232 Wis.2d 365, 606 N.W.2d 620 (Ct. App. 1999)("Bammert I").

While the ERD action was pending, Mrs. Bammert filed a civil complaint alleging wrongful discharge. The defendant moved to dismiss the complaint on several grounds, among them that the complaint failed to state a claim upon which relief could be granted.

After a hearing, the trial court issued a written decision. (R.21) (App. 103-09). Addressing only the issue of whether the plaintiff had stated a claim for violation of the public policy exception to the employment at-will doctrine, the court held that she had not. A judgment was entered in conformity with the court's decision (R.22)(App. 110), and plaintiff appealed from

that judgment. (R.25) In an unpublished decision, the court of appeals affirmed the trial court. It held that the facts did not present a recognized exception to the at-will doctrine and that any expansion of this doctrine must come from the court. Bammert v. Don's Super Valu, Inc., Appeal No. 00-2473, slip op., paras. 10-11 (Wis. Ct. App. June 12, 2001) ("Bammert II") (App. 111-116). Plaintiff petitioned for review of that decision and the petition was granted. Additional facts will be set forth in the argument section of this brief, as appropriate.

ARGUMENT

I. STANDARD ON MOTION TO DISMISS

Both lower courts applied the correct standard for ruling on a motion to dismiss under Wis. Stat. §802.06(2), Stats. The facts pled are taken as admitted and inferences are drawn in favor of the non-moving party. The pleadings are liberally construed and the claim will only be dismissed if the plaintiff cannot recover under any circumstances. Heinritz v. Lawrence Univ., 194 Wis. 2d 606, 610-11, 535 N.W.2d 81, 83 (Ct. App. 1995). Whether to grant a motion to dismiss is a question of law which this court reviews without deference to the lower courts. Id., at 610, 535 N.W.2d at 83.

II. IT IS A VIOLATION OF PUBLIC POLICY TO DISCHARGE AN EMPLOYEE BECAUSE OF HER SPOUSE'S ACTIONS TAKEN TO FULFILL AN AFFIRMATIVE LEGAL OBLIGATION.

An at-will employee who is terminated because her husband, a police officer, aided in the lawful arrest of her employer's wife should be able to recover in a civil action for wrongful discharge against the employer. Such a recovery would be consistent with the public policy exception to the at-will doctrine recognized in Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983).

The general rule regarding employment relationships in the state of Wisconsin is the at-will doctrine. "The doctrine generally allows an employer to discharge an employee for good cause, for no cause, or even for a cause morally wrong, without

being guilty of a legal wrong." Brockmeyer, 113 Wis.2d at 567, 335 N.W.2d 834. Plaintiff concedes that Mrs. Bammert was an at-will employee of the defendant.

However, there are exceptions to the at-will doctrine. One exception exists under the Wisconsin Fair Employment Act (WFEA) if an at-will employee is terminated because of the employee's age, race, creed, arrest record, conviction record, marital status, religion, physical or mental handicap, sex, national origin, ancestry, pregnancy, sexual orientation, or membership in the armed forces. Wis. Stat. §§ 111.31 - 111.395. However, Mrs. Bammert did not have any recourse under the Act since marital status protection was held not to include "spousal identity" in Bammert I.

Another exception to the at-will doctrine is the "public policy exception". This exception allows a terminated employee who is otherwise unprotected (like Mrs. Bammert) to recover if the termination violates a well-established and important public policy. Brockmeyer, 113 Wis.2d at 567-68, 335 N.W.2d 834. "A wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest. The policy must be evidenced by a constitutional or statutory provision." Brockmeyer, 113 N.W.2d at 573, 335 N.W.2d 834. A decade after Brockmeyer, the Wisconsin Supreme Court extended the scope of the exception in holding that the policy could be evidenced by administrative rules, Winkelman v. Beloit Memorial Hosp., 168 Wis.2d 12, 483 N.W.2d 211 (1992),

and by allowing public policy to be evidenced by the spirit, as well as the letter, of a statutory provision. Wandry v. Bull's Eye Credit Union, 129 Wis.2d 37, 384 N.W.2d 325 (1986).

Wisconsin courts now hold that a discharge of an at-will employee invokes the public policy exception in two recognized circumstances. One such circumstance occurs "where the employee is terminated for refusing a command, instruction, or request of the employer to violate public policy as established in existing law." Bushko v. Miller Brewing Co., 134 Wis.2d 136 at 142, 396 N.W.2d 167 (1986).

A second circumstance occurs where the law imposes an affirmative obligation upon an employee and the employee fulfills that obligation and is terminated as a result. Hausman v. St. Croix Care Center, 214 Wis. 2d 655, 571 N.W.2d 3 (1997). "An employer's termination of employment for fulfillment of the legal obligation exposes the employer to a wrongful termination action." Hausman, 214 Wis.2d at 669, 571 N.W.2d 393.

Mrs. Bammert stated a claim upon which relief may be granted. The termination of an employee because her husband did his job and arrested her employer's wife for driving under the influence contravenes the public interest. Society doesn't want law enforcement officers to take into account, when determining whether to make an arrest, whether the officer's spouse might be retaliated against as a result. The public interest is in having the officer make the arrest and remove the intoxicated person from public roadways so that a threat is no longer posed to

innocent persons.

Wis. Stat. § 346.63 evidences the strong public policy against the operation of a motor vehicle while under the influence of an intoxicant or other drug. "No person may drive or operate a motor vehicle while... under the influence of an intoxicant, a controlled substance... to a degree which renders him or her incapable of safely driving." Wis. Stat. § 346.63(1). "Persons who operate motor vehicles while under the influence of an intoxicant or having a blood alcohol concentration of 0.1% or more do so in disregard of the safety and welfare of both themselves and other members of the driving public and of the laws of this state." Laws 1981, c. 20, § 2051(13)(a)(2), as amended by L.1981, c. 184, § 10. "The legislature intends by passage of this act... to provide maximum safety for all users of the highways of this state (and)...to encourage the vigorous prosecution of persons who operate motor vehicles while intoxicated." Laws 1981, c. 20, § 2051(13)(b)(1 & 4), as amended by L.1981, c. 184, § 10.

Officer Bammert has taken an oath "to protect and to serve" the public. As a law enforcement professional, Officer Bammert is under an affirmative obligation to identify and arrest those who pose a threat to public safety by operating a motor vehicle on roadways while under the influence of an intoxicant. Wis. Stat. § 346.63 imposes this obligation, if not in letter, then certainly in spirit.

Officer Bammert, without taking into account any special

protections afforded to government employees, could not have been terminated for his role in the arrest of Nona Williams. There has been no suggestion that the arrest of Nona Williams involved any misconduct by police officers or deviation from standard procedure or was anything other than a lawful arrest. The court in Hausman specifically held that "an employer's termination of employment for fulfillment of the legal obligation exposes the employer to a wrongful termination action." Hausman, 214 Wis.2d at 669, 571 N.W.2d 393.

The public policy exception should be expanded to cover not only the employee upon whom the affirmative obligation is imposed, but also that person's spouse. There are two public policies that come into play. The first is that set forth in Brockmeyer and its progeny. The second is the sanctity of the marital relationship and the importance of families in general:

> To retaliate against a man by hurting a member of his family is an ancient method of revenge, it is not unknown in the field of labor relations.... If the company had fired [its employee] in retaliation for his election as shop steward, there would be no question that it had violated the Act. Instead it fired his mother. If he loves his mother this had to hurt him as well as her.... An effective method of getting at him, a protected worker, it is barred by the statute.

National Labor Relations Bd. v. Advertisers Mfg. Co., 125 L.R.R.M.(BNA) 3024, 106 Lab. Cas. p. 12, 444 (7th Cir. June 29, 1987). This is even more true when the bond affected is that of marriage.

It is the public policy of this state and its courts to

promote the stability of marriage and family. Wis. Stat. §765.001(2). It would make no sense, for example, to hold that a nursing home employee who reports abuse of residents, consistent with a legal obligation to do so, cannot be terminated for the fulfillment of that obligation, but that the employee's spouse, employed at the same home, could be. It is equally illogical to permit the spouse of someone in whom the public has placed its trust, such as a law enforcement officer, to be terminated by their employer in retaliation for the law enforcement officer's performance of a duty. These situations, as evidenced by the case at bar, can and do occur - particularly in smaller communities. This court should expand the public policy doctrine to protect the spouse of an employee from retaliatory discharge for all of the foregoing reasons.

Mrs. Bammert does not argue that protection under the public policy exception should necessarily be extended to more remote parties such as siblings, nephews, nieces, parents or friends. All that is requested in this case is an extension of the exception to cover the spouse of an employee who refuses a command to violate law or public policy or who fulfills an affirmative obligation that is imposed by law or public policy. This would be a reasonable and just extension of the Brockmeyer exception and would not open the floodgates to litigation. Although this appeal presents a situation that can and does occur, such scenarios are admittedly rare in a relative sense and will become even more rare if this court extends the public policy exception to spouses,

because it will act as a deterrent to this type of retaliatory discharge.

CONCLUSION

For the reasons set forth in this brief, this court should reverse the court of appeals and remand this case to the circuit court with instructions to try the merits of the case.

Dated: November 21, 2001.

Respectfully submitted,

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-Petitioner

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of the brief is 11 pages.

Dated: November 21, 2001.

Respectfully submitted,

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STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 00-2473

KAREN R. BAMMERT,

Plaintiff-Appellant-Petitioner,

vs.

DON'S SUPER VALU, INC.,

Defendant-Respondent.

APPENDIX

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Karen M. Bammert vs. Don's Super Valu, Inc.
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STATE OF WISCONSIN CIRCUIT COURT DUNN COUNTY

KAREN BAMMERT

Plaintiff,

vs.

DON'S SUPER VALU, INC.

Defendant.

DECISION AND ORDER

Case No. 99CV188

The issue of this case can be distilled down to the question: "May an employer fire an employee because of activities engaged in by the employee's spouse?"

Karen Bammert (hereinafter Bammert) was a long time employee and was assistant manager of Don's Super Value, Inc. (hereinafter Don's) a grocery store in Menomonie, Wisconsin. Bammert's husband is a sergeant on the City of Menomonie police department. On June 7, 1997, the wife of the owner of Don's was stopped for alleged traffic offenses and was subsequently arrest for operating a motor vehicle while under the influence of an intoxicant. Sergeant Bammert was not the arresting officer, but he was involved in conducting some preliminary breathalyzer tests. Bammert alleges she was fired only because of her husband's involvement as a police officer in these matters. (Don's claims otherwise).

Bammert was unsuccessful in her action for employment discrimination filed with the Equal Rights Division of the State of Wisconsin. She also filed this claim maintaining that her

termination violates the public policy exception to the employee at will doctrine.

Don's has filed a motion to dismiss which this court believes was intended to be made pursuant to sec.802.06(2) Stats.

The standard for deciding such a motion was recently stated in Heinritz v. Lawrence University 194 Wis2d 606, 535 NW2d 81 (Ct. App. 1995) I.E. the facts alleged in the petition are deemed admitted and any inference from those facts is construed against the moving party. The Appellate Courts have directed that the complaint is to be liberally construed and that the motion should be granted only if it is determined plaintiff cannot prevail under any circumstances.

It appears Bammert accepts the proposition that under Wisconsin law, she was an employee of will and therefore could be terminated by Don's for very little, if any, reason. She contends, however, that because she was fired solely because her husband performed his lawful duties, that action violates public policy in this state.

Brockmeyer v. Dun & Bradsheet 131 Wis2d 561, 335 NW2d 834 (1983), is the major case in this state which defines and explains employment at will and which considers public policy against termination. After a lengthy discussion of the history of employment at will, the Wisconsin Supreme Court ruled at 113 Wis2d 572:

> We have concluded that in the interests of employees and the public, a narrow public policy exception should be adopted in

Wisconsin. Accordingly, we hold that an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy an evidenced by existing law.

The court went on to add 113 Wis2d 574:

A plaintiff-employee alleging a wrongfully discharge has the burden of proving that the dismissal violates a clear mandate of public policy. Unless the employee can identify a specific declaration of public policy, no cause of action has been stated. The determination of whether the public policy asserted is a well-defined and fundamental one is an issue of law and is to be made by the trial court. Once the plaintiff has demonstrated that the conduct that caused the discharge was consistent with a clear and compelling public policy, the burden of proof then shifts to the defendant employer to prove that the dismissal was for just cause.

We believe that the adoption of a narrowly circumscribed public policy exception properly balances the interests of employees, employers, and the public. Employee job security interests are safeguarded against employer actions that undermine fundamental policy preferences.

> Employers retain sufficient flexibility to make needed personnel decisions in order to adapt to changing economic conditions. Society also benefits from our holding in a number of ways. A more stable job market is achieved. Well-established public policies are advanced. Finally, the public is protected against frivolous lawsuits since courts will be able to screen cases on motions to dismiss for failure to state a claim or for summary judgment if the discharged employee cannot allege a clear expression of public policy.

The court also recognized that the legislature had enacted statutes prohibiting certain types of discharge, but that every type of wrongful termination was not covered by statute and that the courts must continue to apply common law to employment relationships.

Bushko v. Miller Brewing Company 134 Wis2d 136, 396 NW2d 167 (1986) confirmed that Brockmeyer created a very limited remedy for employees. Bushko reiterated that the termination of an employee for refusing an employer's order to do something prohibited by statute or the Constitution would violate the public policy doctrine against wrongful discharge.

At 134 Wis2d 142 the Court found:

> There is no claim that Bushko was required to violate a constitutional or statutory provision. The plaintiff's counsel acknowledged at oral

arguments that: "Steve Bushko was not ordered by his employers, and he conceded it from the beginning, to do anything that violates the positive law of the State of Wisconsin.

Bammert places her greatest reliance on Hausman v. St. Croix Care Center 214 Wis2d 655, 571 NW2d 393 (1997). Hausman is the obverse of Bushko. Bushko found it was against public policy to discharge an employee for refusing an employer's order if the ordered act would violate the law. In Hausman, employees concerned about the standard of care residents were receiving at the defendant's institution first filed numerous internal complaints and when no action was taken, pursued their allegations to state authorities. The Court recognized the importance of protecting nursing home residents from abuse and neglect. After making that finding, the court at 214 Wis2d 669 held:

> Where the law imposes an affirmative obligation upon an employee to prevent abuse or neglect of nursing home residents and the employee fulfills that obligation by reporting the abuse, an employer's termination of employment for fulfillment of the legal obligation exposes the employer to a wrongful termination action. In such instances, the employee may pursue a wrongful termination suit under the public policy exception regardless of whether the employer has made an initial request, command or instruction that the reporting obligation be violated.

It would be difficult to refute the logic of either Bushko or Hausman. No employee should be threatened with termination or be terminated for refusing an order to break a law or ignoring employer conduct which violates the law. Does Don's decision to terminate Bammert because of legal actions taken by Bammert's husband rise to the same level? This court does not believe Bammert's termination violates the narrow public policy doctrine of Brockmeyer.

Where Don's behavior could be viewed as being churlish and petty it nonetheless appears legal. During oral arguments, Bammert's attorney argued that the sacredness of marriage would limit a finding of wrongful discharge only where a spouse was terminated for the behavior of the other spouse. Unfortunately, this court believes if Don's action to terminate Bammert is found to be a violation of public policy, there would be no reasonable stopping place. Any employee who was discharged could make the claim that the termination was caused by some act toward the employer by any relative or even a close friend of the employee.

Bammert does argue, with some validity, that the failure to recognize her cause of action might cause police officers or others in positions of power to avoid taking official actions against those who employ that person's spouse. If indeed that is a real concern, it would appear that legislation should be enacted to prevent such action. Every aspect of Brockmeyer, Bushko, and Hausman call for a narrow interpretation of what kind of act by an employer should give rise to an employee's claim that the termination of employment was a violation of public

policy. In a general sense all termination of employment seems unfair to the employee. The long the employment term, the more unfair termination seems. Be that as it may, even if an employee is unfairly fired, such action does not give rise to a claim that the termination violates public policy.

For these reasons, Don's motion to dismiss Bammert's complaint for failure to state a cause of action is granted.

Dated this 10th day of July, 2000.

BY THE COURT:

Eric J. Wahl

Circuit Judge, Branch 2

cc: Bradley D. Lawrence
Matthew A. Biegert

STATE OF WISCONSIN | CIRCUIT COURT BRANCH I | DUNN COUNTY

KAREN R. BAMMERT,

Plaintiff,

v.

DON'S SUPER VALU, INC.,

Defendant.

FILED

AUG 0 3 2000

DUNN COUNTY
CLERK OF COURT

Case No. 99 CV 188

Case No. 30607

JUDGMENT

Based on the court's Decision and Order dated July 10, 2000, and filed July 13, 2000:

IT IS ADJUDGED THAT the claims of plaintiff, Karen R. Bammert, who resides at N4378 410th Street, Menomonie, Wisconsin 54751, are dismissed on the merits, with prejudice, and that defendant, Don's Super Valu, Inc., whose mailing address is N7681 540th Street, Menomonie, Wisconsin 54751, shall recover costs from plaintiff in the sum of ~~$267.84~~ 146.44.

Dated this 28th day of July, 2000

BY THE COURT:

Honorable Eric J. Wahl
Circuit Court Judge

COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2473

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

KAREN R. BAMMERT,

PLAINTIFF-APPELLANT,

V.

DON'S SUPERVALU, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Karen Bammert appeals a judgment dismissing her action for wrongful discharge, claiming that her termination from employment violates public policy. Bammert alleges that she was fired because her husband, a police officer, participated in her employer's wife's arrest for driving under the

influence of alcohol. Because Wisconsin is an employment-at-will state and Bammert does not present circumstances that meet an exception to this rule, we affirm the dismissal.

BACKGROUND

¶2 The case is before us as a result of a motion to dismiss. Thus, the following allegations are deemed admitted. ***Heinritz v. Lawrence Univ.***, 194 Wis. 2d 606, 610, 535 N.W.2d 81 (Ct. App. 1995). Bammert worked for Don's SuperValu, Inc., for approximately twenty-six years. Bammert is married to a Menomonie police officer. Don's is owned by Don Williams, whose wife, Nona Williams, was pulled over for a traffic violation. Bammert's husband administered a Breathalyzer test to Nona, who was subsequently arrested for driving under the influence. Bammert was terminated because of her husband's role in Nona's arrest.

¶3 Bammert filed this action alleging wrongful discharge.[1] Don's moved to dismiss on several grounds, including failure to state a claim. The circuit court only addressed whether Bammert had stated a claim for violating a public policy exception to the employment-at-will doctrine. The court concluded that Bammert's claim did not meet an exception and dismissed the action. Bammert now appeals that judgment.

[1] Bammert also filed a claim with the Wisconsin Equal Rights Division stating that she was discriminated against on the basis of "marital status," prohibited under WIS. STAT. §§ 111.31 through 111.395. (All references to the Wisconsin Statutes are to the 1999-2000 version.) The division dismissed her complaint stating that these statutes did not prohibit discrimination based on the identity, characteristics or actions of one's spouse. This dismissal was affirmed on appeal. *See* ***Bammert v. LIRC***, 232 Wis. 2d 365, 606 N.W.2d 620 (Ct. App. 1999).

219 Wis. 2d 99, 115, 579 N.W.2d 217 (1998).[2] "A wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest. The policy must be evidenced by a constitutional or statutory provision." ***Brockmeyer***, 113 Wis. 2d at 573. Where the law imposes an affirmative obligation upon an employee and the employee fulfills that obligation, termination for that reason violates public policy. ***Hausman v. St. Croix Care Ctr.***, 214 Wis. 2d 655, 669, 571 N.W.2d 393 (1997).

¶8 Bammert argues that the ***Brockmeyer*** and ***Hausman*** exceptions should be expanded to include two public policies. She first argues that WIS. STAT. § 343.63 evidences the public policy against the operation of a motor vehicle while under the influence of an intoxicant or other drug. As a law enforcement officer, her husband was under an affirmative obligation to identify and arrest those who pose a threat to public safety. "Society doesn't want our law enforcement officers to take into account, when determining whether to make an arrest, whether the officer's spouse might be retaliated against as a result." Terminating her employment because her husband did his duty by assisting in an OWI investigation violates the public policy of assuring that OWI violations are fully investigated.

¶9 Second, she contends that WIS. STAT. § 765.001(2) evidences the public policy to promote the stability of marriage and family. She argues that an

[2] One exception exists under the Wisconsin Fair Employment Act. An at-will employee may not be terminated because of the employee's marital status. WIS. STAT. §§ 111.31-111.395. However as we noted earlier, Bammert's claim under this Act was dismissed in ***Bammert***, which concluded that the Act was intended to "protect the status of being married in general rather than the status of being married to a particular person." ***Id.*** at 369.

exception to employment-at-will should be made to support the sanctity of the marital relationship and the importance of families in general.

¶10 Under ***Hausman***, an employer cannot fire an employee because the employee fulfilled a legal obligation the law affirmatively imposes on the employee. ***Hausman***, 214 Wis. 2d at 669. However, the law currently does not prohibit firing an employee because his or her spouse fulfilled an affirmatively imposed legal obligation.[3] The court of appeals is primarily an error correcting court. ***Cook v. Cook***, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997). If public policy demands that ***Brockmeyer*** and ***Hausman*** should be extended to cover the actions of a spouse, the legislature or the supreme court must make that pronouncement. *See* ***Cook***, 208 Wis. 2d at 189-90; ***State v. LIRC***, 136 Wis. 2d 281, 297, 401 N.W.2d 585 (1987).

¶11 Under our employment law, an employee can be fired for a good reason, a bad reason, a morally wrong reason or no reason at all. While one could

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[3] Bammert's OWI policy argument rests upon the presumption that an officer's decision whether to perform his or her duty would be influenced by the prospect that his or her spouse would be terminated. We are not convinced that this is a plausible presumption. Moreover, Bammert's extension of the exception takes us into the field of exploring a *spouse's* legal duty, which can be a complicated exercise. Given this and our perception that the argued extension would arise infrequently, we think it is unwarranted.

As to the family relationship public policy, Bammert recognizes that the argument does not provide its own discernible logical stopping point. She thus suggests that the exception be limited to spouses, but she does not demonstrate why the public policy should only protect spouses. Given the policy in question, why not include, for example, parents or siblings? Bammert does not suggest a principled answer.

Bammert attempts to demonstrate that courts have prohibited adverse employment decisions against family members for the act of another family member by citing to ***N.L.R.B. v. Advertisers Mfg. Co.***, 823 F.2d 1086 (7th Cir 1987). However, that case is not persuasive because the court interpreted the National Labor Relations Act and prohibited acts that prevented the free exercise of union activities protected by this Act. ***Id.*** at 1088. The court did not review the firing in the context of the employment-at-will doctrine or its exceptions. Bammert does not contend that her rights under this Act were at issue.

present a persuasive argument that Bammert was terminated for a morally wrong reason, Bammert has not demonstrated that her case qualifies as a recognized exception to the employment-at-will doctrine.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 00-2473

KAREN R. BAMMERT

Plaintiff-Appellant-Petitioner,

v. Trial Court Case No. 98 CV 79

DON'S SUPER VALU, INC.

Defendant-Respondent.

DEFENDANT-RESPONDENT'S BRIEF AND APPENDIX

ON APPEAL FROM A JUNE 12, 2001 DECISION OF
THE COURT OF APPEALS, DISTRICT III, WHICH
AFFIRMED THE JUDGMENT OF THE CIRCUIT COURT FOR
DUNN COUNTY, THE HONORABLE ERIC J. WAHL PRESIDING

PHILLIP M. STEANS, S.C.
By: Phillip M. Steans
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STATEMENT OF FACTS AND OF THE CASE

Prior to filing the complaint in this action, Bammert filed a claim for discrimination with the Wisconsin Department of Workforce Development, Equal Rights Division, on October 2, 1997. (R17, Ex. D) She alleged in the first claim that defendant discriminated against her in violation of the Wisconsin Fair Employment Act based on her marital status. (Id.) In the ERD complaint, Bammert alleges the Williams family became "cool" to her after Nona Williams' arrest, and that Nona Williams' grandson engaged in "bad mouthing" her husband, Sergeant Bammert. (Id.)

The Division dismissed the discrimination claim because the prohibition against discrimination because of marital status does not extend to the particular identity, personal characteristics, or actions of ones spouse. (R17, Ex. E)

The Labor & Industry Review Commission ("LIRC") affirmed the dismissal. (R17, Ex. H) On appeal to the court system, the trial court affirmed the LIRC decision as reasonable within the clear meaning of the statute. (R17, Ex. I; Memorandum Opinion of 4/26/99)

The Court of Appeals affirmed on December 21, 1999. This Court denied Bammert's petition for review. (App. 110)

On August 23, 1999, plaintiff-appellant filed a second complaint alleging that defendant Don's had wrongfully terminated her from its employment. The defendant-respondent filed a motion to dismiss. After a hearing on the matter the

trial court entered judgment against the plaintiff ruling that plaintiff failed to state a claim for violation of the public policy exception to the employment at-will doctrine. (Pet. App. 103; Decision and Order of 7/10/00) Bammert appealed. In an unpublished decision, the Court of Appeals affirmed the trial court. It held that the facts did not present a recognized exception to the at-will doctrine and that any expansion of this doctrine should come from the legislature or the Supreme Court.

Plaintiff again petitioned for review. This petition was granted.

Because this case has been presented as a result of a motion to dismiss the facts pled are to be taken as admitted. Plaintiff's complaint alleges that she was terminated on August 28, 1997. (Resp. App. 101, ¶4) The arrest which her husband participated in, but did not make, occurred two and one half months earlier on June 7, 1997. Sergeant Bammert's only involvement in the arrest was conducting a preliminary breathalizer test.

Bammert alleges she was fired only because of her husband's involvement as a police officer in these matters. As pointed out in Judge Wahl's decision, the defendant claims otherwise. (App. 103)

ARGUMENT

The record in this case supports the Court of Appeals affirmation of Judge Wahl's decision to dismiss Bammert's

complaint. She did not, and has not, identified a clear fundamental public policy that would support her wrongful termination claim under Wisconsin law.

Wisconsin law is well settled and long ingrained--we are an at-will employment state.

The public policy exception to the at-will employment doctrine was first announced in Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834, 840 (1983). Under that doctrine, an at-will employee states a claim for wrongful termination if "the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest". (Id., 335 N.W.2d at 837; emphasis added) Under Brockmeyer, the public policy exception is "limited" and "narrow". (Id. at 840)

In Wandry v. Bull's Eye Credit Union, 129 Wis. 2d 37, 384 N.W.2d 325, 327 (1986), the court stated that it would recognize a cause of action for wrongful termination only if the plaintiff identifies (1) the fundamental, well-defined public policy mandate the discharge is alleged to have violated, as well as (2) the constitutional or statutory provision evidencing the public policy mandate, and (3) facts that show how the termination contravened the State stated public policy.

The plaintiff's complaint, and this record, are insufficient to do so. (Resp. App. 101)

In 1997, this Court concluded that the public policy

exception included instances in which the employer terminates the employee for fulfilling an affirmative legal obligation. Hausman v. St. Croix Care Ctr., 214 Wis. 2d 654, 571 N.W.2d 393, 398 (1997)

But, in Kempfer v. Automated Finishing, Inc., 211 Wis. 2d 101, 564 N.W.2d 692, 697 (1997), this Court clarified that "the public policy exception does not apply in cases where the employee at-will is simply discharged for acting consistently with the fundamental and well defined public policy; *there must be an order by the employer to violate the public policy*". (Emphasis Added)

Importantly, each time this court has expanded the public policy exception, it has immediately reiterated that the exception remains narrow. See Bushko v. Miller Brewing Co., 134 Wis. 2d 136, 396 N.W.2d 167 (1986) and Kempfer, Ibid.

In Tatge v. Chambers & Owen, Inc., 219 Wis. 2d 99, 579 N.W.2d 217 (1998), this Court held that terminating an employee for failing to sign a non-disclosure and non-competition agreement did not give rise to a cause of action for wrongful termination under the public policy exception. The statute cited in Tatge enunciated the important public policy of protecting employees from having to comply with unreasonable restrictive covenants. However, because the question of "reasonableness" varies from agreement to agreement this Court felt that the statute did not create or evidence a policy of protecting employees from signing any

non-compete agreement that the employee finds unreasonable. (Id.) In short, the employee did not identify a clear public policy prohibiting non-compete agreements altogether.

This Court has very recently reiterated that the public policy exception is a "very narrow" one that "beg[s] judicial caution". Strozinsky v. School Dist. of Brown Deer, 237 Wis. 2d 19, 37 2000 WI 97, 614 N.W.2d 443 (2000) (237 Wis. 2d at 42, 614 N.W.2d at 454) This Court emphasized that it:

> "Has not departed from a narrow interpretation of the public policy exception to the employment at-will doctrine [but has consistently] maintain[ed] the legislative goal of balancing the public interest and the private interests of employers and employees." Id., 237 Wis. 2d at 54-55, 614 N.W.2d at 460

This Court has refused to recognize a cause of action for wrongful termination and violation of public policy except in these very narrow instances. In Weyenberg Shoe Mfg. Co. v. Seidl, 140 Wis. 2d 373, 410 N.W.2d 604, 608 (Ct. App. 1987), an employees' cause of action for wrongful discharge failed because he did not show that his termination was based on a refusal to violate public policy, i.e. attending national guard camp was not a refusal to violate a public policy and therefore did not fall under the "extremely narrow exception".

Bammert now argues that Wisconsin's public policy prohibiting operation of motor vehicles while under the influence, and Wisconsin's family code recognizing the value of marriage as the foundation of family in society are the statutory basis in support of her argument. She therefore

contends she has met her burden of alleging a wrongful termination in violation of a clear well defined fundamental public policy.

However, even if 346.63 Wis. Stats. invokes a public policy of imposing on law enforcement officers the affirmative obligation to identify and arrest drunk drivers as plaintiff suggests (Petitioner's brief at Pg. 8), the uncontroverted evidence in the record shows that Sergeant Bammert did not arrest Nona Williams. He merely assisted other arresting police officers by administering a preliminary breath test.

There is no indication in the record that he participated in the administration or interpretation of field sobriety tests. A subsequent breathalizer test was administered by yet another officer. The decision to continue the prosecution was made by the local prosecuting officer.

Petitioner-appellant's argument would therefore suggest that the spouse's of any of these law enforcement officers or of members of the district attorney's staff (or perhaps of the judge who convicted), who happened to work for a spouse of the arrested person (or in this case his corporation, another entity) who happened to be terminated two and one half months later would have stated a cause of action. Brockmeyer and its progeny do not, and should not, go that far.

Nor does the family law statute relied upon clearly state a fundamental public policy that was implicated or contraindicated by the corporation's actions. The statute

does not clearly articulate a public policy that employers may never discharge married people nor does it suggest that it is unlawful for an employer to terminate an at-will employee based on the employer's grudge against, anger toward, or dispute with its employee's spouse.

Just because the plaintiff identifies a statute or rule containing a public policy does not mean that the wrongful termination action stands. This was recognized in Reilly v. Waukesha County, 193 Wis. 2d 527, 535 N.W.2d 51 (Ct. App. 1995). In Reilly, as in the present case, the plaintiff identified a statute that had an underlying public policy. (The rationale of certain rules promulgated under the cited statute was to protect juveniles in residential facilities.) One rule stated that staff supervisors should not supervise two units at the same time. The plaintiff in Reilly claimed that her discharge for refusing to watch two units violated the statutes public policy. The Reilly court rejected her reasoning. "Significantly it is the children's safety that is the essence of the public policy that underlies the rule, not the mechanism by which the rule enforces that policy." Id. at 56

Similarly, the plaintiff misses the mark in the instant case. She has identified Wisconsin Statutes that have important public policies supporting them--people should not drive while impaired by alcohol, and promotion of the best interests of marriage. However, neither statute clearly

states a public policy invoked or violated by Don's actions.

Surely a statute prohibiting an employer from discharging an employee based on a dispute with the employee's spouse would be found in Wisconsin's Fair Employment Act, if such a statute existed. Bammert argues that this court should "expand" the narrow public policy exception to encompass not only a termination allegedly based on an employee's fulfillment of a legal obligation, but also on an employee's spouse's fulfillment of a legal obligation.

There is no Wisconsin precedent to support such a rule.

The only case law cited to support this argument is the labor law case of NLRB v. Advertisers Mfg. Co., 823 F.2d 1086 (7th Cir. 1987). There an employer was found to violate the NLRB by firing a supervisor based on her son's pro-union activities. That case was a case which presented after full development of the facts below. Furthermore, the federal court of appeals reasoned that firing the son for his union activities would have violated the labor act and firing the man's mother "had to hurt him as well as her". Id. at 1088-89 In other words, firing the employee's mother was "an effective method of getting at him". Id at 1089 Because the labor law, the statute, specifically barred a company from punishing an employee for union activities, the company's punishment by firing the employee's mother was in violation of that statute. No such statute exists here.

As the trial court stated,

> ". . . if Don's action to terminate Bammert is found to be a violation of public policy, there would be no reasonable stopping place. Any employee who was discharged could make the claim that the termination was caused by some act toward the employer by any relative or even a close friend of the employee." (Appendix 103; Decision and Order of 7/10/00 at 6)

Bammert in her recently filed brief now requests only an extension to cover the spouse of an employee. However, any logic which would support that extension by this Court also supports further extension. Despite the appellant-petitioner's last minute effort to circumscribe its request, there is no reasonable stopping place.

CONCLUSION

Plaintiff-appellant-petitioner has failed to identify a clear and fundamental public policy contravened by defendant's decision to terminate her at-will employment. The complaint was properly dismissed by the trial court, and properly affirmed by the Court of Appeals. This Court should decline the petitioner's invitation to extend the exception and should affirm the decisions of the lower courts dismissing Bammert's complaint.

Respectfully submitted this 12th day of December, 2001.

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Attorneys for Defendant-Respondent

By: 
Phillip M. Steans
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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is **10** pages.

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is _____ words.

Dated this 12th day of December, 2001.

PHILLIP M. STEANS, S.C.
Attorneys for Defendant-Respondent

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STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 00-2473

KAREN R. BAMMERT

Plaintiff-Appellant-Petitioner,

v. Trial Court Case No. 98 CV 79

DON'S SUPER VALU, INC.

Defendant-Respondent.

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STATE OF WISCONSIN CIRCUIT COURT BRI DUNN COUNTY

KAREN R. BAMMERT
N4378 410th Street
Menomonie, WI 54751,

Plaintiff,

v.

DON'S SUPER VALU, INC.
503 South Broadway
Menomonie, WI 54751,

Defendant.

Case No.: 99CV188

FILED
AUG 23 1999
DUNN COUNTY
CLERK OF COURT

COMPLAINT

Case Code: 30607

The plaintiff complains of the defendant as follows:

1. Karen R. Bammert is an adult resident of Dunn County, Wisconsin with an address of N4378 410th Street, Menomonie, Wisconsin 54751.

2. Don's Super Valu, Inc. is a Wisconsin corporation licensed to do business in the State of Wisconsin with a mailing address of 503 South Broadway, Menomonie, Wisconsin 54751.

3. Karen Bammert was employed by the defendant as an Assistant Manager at its supermarket.

4. On August 28, 1997, plaintiff was terminated by the defendant.

5. Such termination was wrongful and in violation of the public policy of the State of Wisconsin. Specifically, such termination was in retaliation for Bammert's spouse, a law enforcement officer, participating in the arrest of her employer's spouse.

6. As a result of the termination, Bammert has suffered damages including lost wages and benefits, mental distress, and out of pocket expenses.

WHEREFORE, judgment is demanded against the defendant for damages in accordance with the allegations of the complaint.

Dated: August 20, 1999.

DOAR, DRILL & SKOW, S.C.

/S/

Matthew A. Biegert
Attorneys for Plaintiff
Attorney No.: 1000368

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STATE OF WISCONSIN CIRCUIT COURT DUNN COUNTY

KAREN BAMMERT

Plaintiff,

vs.

DON'S SUPER VALU, INC.

Defendant.

DECISION AND ORDER

Case No. 99CV188

The issue of this case can be distilled down to the question: "May an employer fire an employee because of activities engaged in by the employee's spouse?"

Karen Bammert (hereinafter Bammert) was a long time employee and was assistant manager of Don's Super Value, Inc. (hereinafter Don's) a grocery store in Menomonie, Wisconsin. Bammert's husband is a sergeant on the City of Menomonie police department. On June 7, 1997, the wife of the owner of Don's was stopped for alleged traffic offenses and was subsequently arrest for operating a motor vehicle while under the influence of an intoxicant. Sergeant Bammert was not the arresting officer, but he was involved in conducting some preliminary breathalyzer tests. Bammert alleges she was fired only because of her husband's involvement as a police officer in these matters. (Don's claims otherwise).

Bammert was unsuccessful in her action for employment discrimination filed with the Equal Rights Division of the State of Wisconsin. She also filed this claim maintaining that her

termination violates the public policy exception to the employee at will doctrine.

Don's has filed a motion to dismiss which this court believes was intended to be made pursuant to sec.802.06(2) Stats.

The standard for deciding such a motion was recently stated in Heinritz v. Lawrence University 194 Wis2d 606, 535 NW2d 81 (Ct. App. 1995) I.E. the facts alleged in the petition are deemed admitted and any inference from those facts is construed against the moving party. The Appellate Courts have directed that the complaint is to be liberally construed and that the motion should be granted only if it is determined plaintiff cannot prevail under any circumstances.

It appears Bammert accepts the proposition that under Wisconsin law, she was an employee of will and therefore could be terminated by Don's for very little, if any, reason. She contends, however, that because she was fired solely because her husband performed his lawful duties, that action violates public policy in this state.

Brockmeyer v. Dun & Bradsheet 131 Wis2d 561, 335 NW2d 834 (1983), is the major case in this state which defines and explains employment at will and which considers public policy against termination. After a lengthy discussion of the history of employment at will, the Wisconsin Supreme Court ruled at 113 Wis2d 572:

> We have concluded that in the interests of employees and the public, a narrow public policy exception should be adopted in

Wisconsin. Accordingly, we hold that an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy an evidenced by existing law.

The court went on to add 113 Wis2d 574:

A plaintiff-employee alleging a wrongfully discharge has the burden of proving that the dismissal violates a clear mandate of public policy. Unless the employee can identify a specific declaration of public policy, no cause of action has been stated. The determination of whether the public policy asserted is a well-defined and fundamental one is an issue of law and is to be made by the trial court. Once the plaintiff has demonstrated that the conduct that caused the discharge was consistent with a clear and compelling public policy, the burden of proof then shifts to the defendant employer to prove that the dismissal was for just cause.

We believe that the adoption of a narrowly circumscribed public policy exception properly balances the interests of employees, employers, and the public. Employee job security interests are safeguarded against employer actions that undermine fundamental policy preferences.

> Employers retain sufficient flexibility to make needed personnel decisions in order to adapt to changing economic conditions. Society also benefits from our holding in a number of ways. A more stable job market is achieved. Well-established public policies are advanced. Finally, the public is protected against frivolous lawsuits since courts will be able to screen cases on motions to dismiss for failure to state a claim or for summary judgment if the discharged employee cannot allege a clear expression of public policy.

The court also recognized that the legislature had enacted statutes prohibiting certain types of discharge, but that every type of wrongful termination was not covered by statute and that the courts must continue to apply common law to employment relationships.

Bushko v. Miller Brewing Company 134 Wis2d 136, 396 NW2d 167 (1986) confirmed that Brockmeyer created a very limited remedy for employees. Bushko reiterated that the termination of an employee for refusing an employer's order to do something prohibited by statute or the Constitution would violate the public policy doctrine against wrongful discharge.

At 134 Wis2d 142 the Court found:

> There is no claim that Bushko was required to violate a constitutional or statutory provision. The plaintiff's counsel acknowledged at oral

arguments that: "Steve Bushko was not ordered by his employers, and we conceded it from the beginning, to do anything that violates the positive law of the State of Wisconsin.

Bammert places her greatest reliance on Hausman v. St. Croix Care Center 214 Wis2d 655, 571 NW2d 393 (1997). Hausman is the obverse of Bushko. Bushko found it was against public policy to discharge an employee for refusing an employer's order if the ordered act would violate the law. In Hausman, employees concerned about the standard of care residents were receiving at the defendant's institution first filed numerous internal complaints and when no action was taken, pursued their allegations to state authorities. The Court recognized the importance of protecting nursing home residents from abuse and neglect. After making that finding, the court at 214 Wis2d 669 held:

> Where the law imposes an affirmative obligation upon an employee to prevent abuse or neglect of nursing home residents and the employee fulfills that obligation by reporting the abuse, an employer's termination of employment for fulfillment of the legal obligation exposes the employer to a wrongful termination action. In such instances, the employee may pursue a wrongful termination suit under the public policy exception regardless of whether the employer has made an initial request, command or instruction that the reporting obligation be violated.

It would be difficult to refute the logic of either Bushko or Hausman. No employee should be threatened with termination or be terminated for refusing an order to break a law or ignoring employer conduct which violates the law. Does Don's decision to terminate Bammert because of legal actions taken by Bammert's husband rise to the same level? This court does not believe Bammert's termination violates the narrow public policy doctrine of Brockmeyer.

Where Don's behavior could be viewed as being churlish and petty it nonetheless appears legal. During oral arguments, Bammert's attorney argued that the sacredness of marriage would limit a finding of wrongful discharge only where a spouse was terminated for the behavior of the other spouse. Unfortunately, this court believes if Don's action to terminate Bammert is found to be a violation of public policy, there would be no reasonable stopping place. Any employee who was discharged could make the claim that the termination was caused by some act toward the employer by any relative or even a close friend of the employee.

Bammert does argue, with some validity, that the failure to recognize her cause of action might cause police officers or others in positions of power to avoid taking official actions against those who employ that person's spouse. If indeed that is a real concern, it would appear that legislation should be enacted to prevent such action. Every aspect of Brockmeyer, Bushko, and Hausman call for a narrow interpretation of what kind of act by an employer should give rise to an employee's claim that the termination of employment was a violation of public

policy. In a general sense all termination of employment seems unfair to the employee. The longer the employment term, the more unfair termination seems. Be that as it may, even if an employee is unfairly fired, such action does not give rise to a claim that the termination violates public policy.

For these reasons, Don's motion to dismiss Bammert's complaint for failure to state a cause of action is granted.

Dated this 10th day of July, 2000.

BY THE COURT:

Eric J. Wahl

Circuit Judge, Branch 2

cc: Bradley D. Lawrence
Matthew A. Biegert

IX

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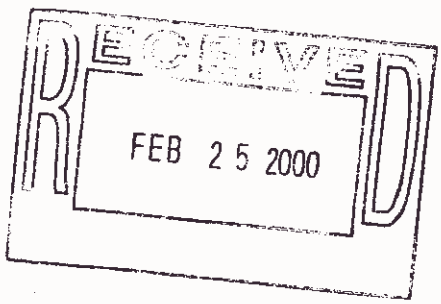
You are hereby notified that the Court has entered the following order:

No. 99-1271 Bammert v. LIRC, et al. L.C.#98CV79

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Karen R. Bammert, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark
Acting Clerk of Supreme Court



STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 00-2473

KAREN R. BAMMERT,

Plaintiff-Appellant-Petitioner,

vs.

DON'S SUPER VALU, INC.,

Defendant-Respondent.

ON APPEAL FROM A JUNE 12, 2001 DECISION
OF THE COURT OF APPEALS, DISTRICT III
AFFIRMING A JUDGMENT OF THE CIRCUIT COURT
FOR DUNN COUNTY, THE HONORABLE ERIC J. WAHL PRESIDING

PLAINTIFF-APPELLANT-PETITIONER'S REPLY BRIEF

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ARGUMENT

Defendant's brief successfully articulates that Karen Bammert does not have a clearly defined claim under Wisconsin law. It does nct, however, offer any persuasive reason why she should not have a claim.

Under Hausman v. St. Croix Care Ctr., 214 Wis.2d 655, 571 N.W.2d 393 (1997), "an employer's termination of employment for fulfillment of a legal obligation exposes the employer to a wrongful termination action". Id., at 669, 571 N.W.2d 393. Contrary to defendant's representations, there is no requirement that the employee refuse a directive to violate a law or public policy. Rather, this is a separate circumstance under which a wrongful termination claim may be brought. See e.g. Bushko v. Miller Brewing Co., 134 Wis.2d 136, 396 N.W.2d 167 (1986); Kempfer v. Automated Finishing, Inc., 211 Wis.2d 101, 564 N.W.2d 692 (1997).

There should be no serious argument that, on a motion to dismiss, a law enforcement officer who asserted she was fired for assisting in the arrest of someone with political pull for drunk driving states a claim for wrongful termination.[1] The sole issue for this court is whether the

[1] The defendant employer argues that a distinction should be drawn between participating in an arrest and being the arresting officer. It then cites to factual material not properly considered on a motion to dismiss.

If a law enforcement officer is terminated for enforcing the law, such a termination violates public policy. The centrality of the officer's role in any law enforcement activity may go to the factual question of

officer's spouse can be terminated as a result of this same protected conduct.

On this question, the employer does not offer any reason why a spouse should not be protected. Instead, it argues that if a spouse is protected there is no logical stopping point and that other family members and friends, presumably less deserving of protection, will fall under this exception to at-will employment.

At-will employment is not sacrosanct. It is an efficient way of organizing the economy. As the Brockmeyer[2] line of cases recognizes, however, it is not absolute. The policies supporting employment-at-will must be balanced against other, equally important, public policies.

There is a logical reason for extending the protection of Brockmeyer and its progeny to spouses. Marriage is a unique and legally sanctioned relationship. Wisconsin's statutes, and any number of cases, swell on the importance of the marital relationship.

As a society, we would probably wish to protect from retaliation anyone with whom Officer Bammert had a close, intimate relationship. Yet, this may not be practicable. A blood relation is not necessarily close in a personal sense. Additionally, a person can have varying degrees of affection to numerous relatives and friends.

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whether it was, in fact, the reason for the termination, but it does not impact the public policy reasons prohibiting discharge.

[2] Brockmeyer v. Dunn & Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983).

In this case, the ccurt need not determine where to draw the line. It need only determine that spouses fall on the protected side of that line. The unique nature of the marriage, including the fact that it can be terminated by the parties, make it a good proxy for determining that the relationship is a close and intimate one. The fact that individuals may have only one spouse means that the number of possible claimants is limited. In any number of legal contexts; employee benefits, taxes, testimonial privilege; the martial relationship is treated differently from all others. There is no reason to suppose that a limited extension of public policy protections to spouses would ultimately expand beyond that classification.

CONCLUSION

Karen Bammert should be found to have stated a claim for relief, and the trial court's judgment should be reversed.

Dated: December 31, 2001.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of the brief is 3 pages.

Dated: December 31, 2001.

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